SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 579

INTERSTATE COMMERCE COMMISSION, THE CHESAPEAKE AND OHIO RAILROAD COMPANY, ET AL.,

Appellants,

vs.

JAMES McWILLIAMS BLUE LINE, INC., T. A. D. JONES & CO., INC., WYATT, INC., THE HARTFORD ELECTRIC LIGHT CO., AND THE UNITED ILLUMINATING COMPANY,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

These appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court, move that the decree of the District Court be affirmed.

Statement

This is a direct appeal from the final decree dated November 9, 1951 of a specially constituted District Court of three judges, convened pursuant to the provisions of Title 28, United States Code, Section 2284, to hear and decide an

action brought by appellees in the United States District Court for the Southern District of New York entitled *James McWilliams Blue Line, Inc., et al.* v. *The United States of America, et al., Civil* No. 65-270. By their complaint appellees sought a decree of the court enjoining and setting aside a decision and order of the Interstate Commerce Commission in a proceeding entitled *James McWilliams Blue Line, Inc., et al.* v. *Campbell's Creek R.R. Co., et al.*, 278 I.C.C 312, Docket No. 30122 on the Commission's docket. The United States was named as defendant as provided by the statute but filed an answer admitting the allegations of appellees' complaint and praying that the Commission's order be set aside as erroneous, arbitrary, unsupported by substantial evidence and contrary to law. The Interstate Commerce Commission, the railroads named as defendants in the proceeding before it and railroads which had intervened therein intervened in the court below in defense of the Commission's decision and order.

The three-judge court upheld the contentions of the appellees and the United States, and by the decree which is here appealed from set aside and enjoined the decision and order of the Commission and directed the Commission to enter an appropriate order in accordance with the court's conclusions. The opinion of the three-judge court is reported at 100 F. Supp. 66.

The appeal from the decree of the District Court was allowed on January 8, 1952 and the appeal papers were served upon counsel for appellees on that day.

The proceedings before the Commission were upon the complaint of these appellees alleging that the railroads engaged in transporting coal from mines to the Hampton Roads ports violated Section 1, 2, and 3[1] of the Interstate

[1] For convenience, the pertinent portions of these provisions are reproduced in the appendix hereto.

Commerce Act when they demanded and charged higher rates for such transportation if the coal after being transported from Hampton Roads to a New England port, thereafter was moved from the New England port to point of ultimate delivery in New England by plaintiff James McWilliams Blue Line, a water carrier, or by some other barge carrier, than the rates charged by these railroads for the identical rail transportation from mines to Hampton Roads if the coal subsequently moved from the New England port to point of ultimate delivery by railroad.

Appellees contended before the Commission, among other things, that the determination of their complaint was controlled by the decision of this Court in *I.C.C.* v. *Mechling*, 330 U.S. 567 (1946), in which this Court held that railroads violated the Interstate Commerce Act when they charged higher rates for transporting freight which had had a prior movement by water than the rates charged by them for the same transportation if the prior movement was by a railroad. Appellees urged upon the Commission that the only difference between the *Mechling* case and theirs was that in the *Mechling* case the water movement preceded and here it followed the rail transportation for which the different charges were demanded. And appellees argued that this factual difference made no difference in the application and effect of the provisions of the statute. The majority of the Commission, however, declined to follow the *Mechling* case and with five Commissioners dissenting found that the rates and practices complained of were lawful and dismissed appellees' complaint.

Appellees then instituted this action against the United States to review and set aside the Commission's decision and order of dismissal.

The three-judge court below ruled that the decisions of this Court in the *Mechling* case and in other earlier cases were controlling here. Without considering whether Sec-

tions 1 and 3 of the Interstate Commerce Act were violated, the court held that the rate practices complained of violated Section 2 of that Act forbidding the demanding of a higher rate from one person than charged to any other person "for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."[2]

By its decree the court below vacated and set aside the Commission's order dismissing appellees' complaint and directed the Commission to make and enter an order requiring the railroads concerned to cease and desist from continuing the rates and practices found by the court to be in violation of Section 2 and enjoined the Commission from further continuing and enforcing such practices.

It is from this order that appeal is taken by the interveners below, the Commission and the intervening railroads. The United States has not joined in the appeal.

Appellee Blue Line, like the Mechling Barge Line, is a water carrier engaged, among other things, in moving coal by barge from New Haven, Conn. to points of ultimate delivery in New England, such as Hartford. It is in competition for this traffic with the New Haven Railroad, and naturally, the higher freight rates demanded of shippers for transporting coal from mines to Hampton Roads if they use Blue Line's services than if they forward their coal by railroad are a serious competitive obstacle which offsets the advantage to shippers of the cheaper costs of water transportation.

Appellees T. A. D. Jones & Co. and Wyatt, Inc. are coal dealers with yards at New Haven, Conn., located and with equipment designed for the forwarding of coal to points of

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[2] Here, of course, the service, traffic, circumstances and conditions in so far as related to the transportation of coal from mines to Hampton Roads for which different rates were charged, were not only "like" and "substantially similar", but they were identical.

ultimate delivery by barges or other water carriers. They also have rail sidings and can and do ship coal by rail, but they can do so only by incurring somewhat greater labor expense for handling and by leaving idle their installations for transferring coal to barges. They buy coal at mines in Virginia, West Virgina and Kentucky, cause it to be shipped by railroad to the Hampton Roads ports and transshipped from there by coastwise ships to New Haven. From there they forward the coal to purchasers at points of ultimate delivery in the interior. Among such purchasers are appellees Hartford Electric Light Co. and United Illuminating Company, which have plants designed for the receipt of coal by water.

The only railroads named as defendants in appellees' complaint to the Commission were the railroads engaged in transporting the coal from mines to the Hampton Roads ports.

Numerous northern railroads intervened in the proceeding, claiming that the removal of the discrimination sought by the complaint would lead to disruption of their rates from other mines to northern ports and destinations.

All of the appellees desire to have coal moved from New Haven to ultimate destination by barge but are penalized for so doing by the action of the defendant railroads in demanding rates for transporting the coal from mines to Hampton Roads if the final movement is by barge, which are 45 cents per ton higher than the rates which they charge for the identical transportation service if the final movement is by the New York, New Haven & Hartford Railroad or other rail carrier. The charging by the railroads of different rates for the same transportation from mines to Hampton Roads ports is accomplished by the collection in the first instance of a rate of $3.42 per ton, as an example, and then refunding 45 cents per ton to the shipper of the

coal on certification by him that the coal has been moved from a New England port to ultimate destination by railroad, while denying such a refund if the final movement is by a water carrier.

It was this practice and the higher rates demanded where the final movement is by water which were the subject of the complaint, appellees alleging that they constituted discrimination, preference and prejudice as between shipments and shippers by water and by rail, and as between the Blue Line, as water carrier, and the New Haven Railroad, within the prohibitions of Sections 2 and 3 of the Interstate Commerce Act.

The Grounds for the Motion to Affirm

Appellees, as grounds for this motion to affirm, submit that the appeal raises no new or substantial questions, that the decisions of this Court in the *Mechling* case and in earlier cases are controlling here, and that the three-judge court ruled correctly in the light thereof.

Despite the efforts of appellants by their jurisdictional statement to have it appear that the appeal presents novel and important issues calling for review by this Court of the decision of the three-judge district court and their contentions that the lower court's decision was at variance with established legal doctrines and would extend the provisions of the Interstate Commerce Act beyond its intended borders, nevertheless brief analysis will show that the lower court merely followed principles well established by the decisions of this Court. It is submitted, therefore, that its judgment should be affirmed on the record.

ARGUMENT

The Decision of the Lower Court Was Correct, and Required by the Decisions of This Court in the Mechling Case and Earlier Cases. The Appeal Presents No New or Substantial Questions. Therefore the Judgment Below Should Be Affirmed.

Preliminary

By their jurisdictional statement and by the use therein of such terms as "proportional rates," "revenue case," and "single increase rule" appellants would have it appear that the case has to do with a complicated freight rate and economic situation which gives rise to novel and substantial questions as to the meaning and effect of the Interstate Commerce Act, which questions were not present or decided in the *Mechling* case and in earlier cases, and that the decision of the lower court would impose unwarranted limits on the authority of the Commission under that Act. As a matter of fact, however, the facts and rates in so far as appellees' complaint was concerned were simple, involving only the charges of the few railroads named as defendants for transporting coal from mines to Hampton Roads. However, even if it were otherwise, and if many other freight rates would be affected by correcting the rates and practices complained of, this would not remove this case from the controlling effect of the decision in the *Mechling* case. For there, as here, the railroads and the Commission sought to excuse the charging of higher rates for the transportation of freight if another portion of the through movement had been by water than the rates charged if such other part of the through haul was by railroad, by the claim that a decision that such discrimination was prohibited by Sections 2 and 3 of the Act would cause a general disruption of a complicated rate structure. This Court summarily

disposed of the contention that such a consequence excused discrimination which the Act was designed to prohibit, saying (p. 580):

> "* * * The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress."

With this background appellants rest their attack on the holding of the three-judge court that the decisions in the *Mechling* case and earlier cases require the conclusion that Section 2 of the Act was violated by the rate discrimination complained of on the following contentions:

1. That the decision in the *Mechling* case cannot or should not be extended to what are here referred to as "proportional rates" and that this would "distort the purpose of Section 2" and cast doubt on the validity of a large number of "proportional rates".
2. That the lower court's decision would deprive the Commission of its authority to determine what are "like and contemporaneous services", "like kind of transportation" and what circumstances and conditions are "substantially similar" within the meaning of Section 2 of the Act.
3. That the lower court's decision deprives the Commission of authority to look "through form to substance" and conclude that although rates charged by the railroads for the same transportation service differ by 45 cents per ton, they really are "no different".
4. That the lower court's decision was contrary to the *Barringer* case.
5. That even if there was discrimination in violation of Section 2 of the Act, the appellees were not entitled to invoke the law before the District Court.

It is submitted that these contentions are without merit and that there is no substance therein.

Point I

Whether or Not the Rates for the Transportation of Coal from Mines to the Hampton Roads Ports Are Properly Described as "Proportional Rates", the Decision of the Court Below Involved Neither Extension of the Mechling Case Nor Distortion of the Purpose of Section 2 of the Interstate Commerce Act. Neither Was It Based upon a Construction of Section 2 Which Deprived the Commission of Authority Thereunder. Indeed the Decision Below Was Entirely in Conformity With the Rulings of This Court and the Established Interpretation of the Act Hence No New or Substantial Issue Is Raised by the Appeal.

The discussion under this point will be addressed to the propositions urged by appellants under Points 1, 2 and 3 of their jurisdictional statement. In these points the rates on coal to the Hampton Roads ports, the lawfulness of which was put in issue by the complaint to the Commission, are designated by appellants as "proportional rates".[3] Appellants advance various arguments to support the claim, in effect, that where proportional rates are concerned the railroads have broader latitude than otherwise to discriminate, and that the decision and decree of the court below setting aside the Commission's dismissal of appellees' complaint and holding that the Commission erred, unduly interfered with the claimed authority of the Commission, despite the express prohibition of Section 2, to permit railroads to charge more to shippers for the transportation of freight which they thereafter forward

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[3] The term "proportional rate" is generally understood to describe a rate charged for the transportation of freight which has a further movement either before or after the transportation for which the proportional rate is charged. It is part of the total charges for a through movement, *Morrell & Co. v. N.Y.C. R.R. Co.*, 104 I.C.C. 104, 128.

by a water carrier than they charge to shippers for the same service if the further movement of the freight is by railroad. It is said that this holding of the lower court constitutes an infringement upon the Commission's authority, that it distorts the purpose of Section 2, and that it ignores the economic purposes of the Act. Other and supplementary arguments are advanced to support this claim.

If new questions were thus raised and if the application, meaning and effect of Section 2 had not been previously passed upon by this court in numerous cases, the appellants' contentions might present issues meriting argument thereon before this Court. However, the questions raised are not new. This Court, not only in the *Mechling* case but also in earlier decisions, has expounded the effect and purpose of Section 2, and the decision of the lower court here does not go beyond but correctly follows the law as thus enunciated.

Thus the reference to the rates complained of as "proportional rates" creates no extension of the decision in the *Mechling* case, because there, likewise, the rates held by this Court to be unlawful were proportional rates in that they were rates for transportation constituting part of a through movement involving a prior haul by either rail or water carriers (pp. 570, 572, 573). This was the whole point of the case. And this Court clearly held that under Section 2 of the Act the Commission could not lawfully find that the charging of higher rates for transportation between two points as a part of a through movement was justified if the previous part of the through haul was by a barge carrier than the rates charged when the prior movement was by a railroad. The court said (p. 576):

> "* * * Finally § 2 of the pre-existing Act has long forbidden the Commission to authorize railroads to

> charge one person more than another for 'a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions . . .' 24 Stat. 379, 380, 40 U.S.C. § 2."

Thus in effect it held that a difference in the nature of the prior movement was not something upon which the Commission could lawfully base a finding that the circumstances and conditions under which the transportation was performed for which the different rates were charged were not "substantially similar" within the meaning of Section 2.

Hence the district court here in reaching a similar conclusion did not extend the holding in the *Mechling* case nor give to Section 2 a new and "distorted" interpretation. This is so unless the law is different where the difference in rates for the same transportation service is predicated upon the nature of a subsequent rather than a preceding factor of the through movement. Surely this cannot be the case.

Nor did the decision below, any more than did that in the *Mechling* case, distort or give a new interpretation to Section 2, in holding that the character of the prior or subsequent haul did not constitute a difference in circumstances with regard to the particular transportation for which the different rates were charged. For it has long been well settled that the provision in Section 2 regarding "substantially similar circumstances and conditions" has reference only to the circumstances and conditions of the transportation itself the rates for which are in issue. Thus, in *Int. Com. Com.* v. *Delaware, L. & W. R.R.*, 220 U.S. 235 (1911), this Court said (p. 253):

> "It is not open to question that the provisions of § 2 of the act to regulate commerce was substantially

> taken from § 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause. *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U.S. 197, 222. Certain also is it that at the time of the passage of the act to regulate commerce that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, *in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated.*" (Emphasis added)

And previously the Commission itself had ruled in *Chattanooga Packet Co.* v. *I.C.R.R. Co.*, 33 I.C.C. 384, 392, that:

> "The fact that the proportional rates to and from the Ohio River are compelled by competition can have no bearing upon our determination of the issue of unjust discrimination. The 'like circumstances and conditions' referred to in section 2 of the act are those which arise within the field of haulage, and do not include competition. *Wight v. U.S.*, 167 U.S. 512; *I.C.C. v. A.M.R.R. Co.*, 168 U.S. 144. The shippers who desire to avail themselves of the water-and-rail route must be given equal treatment with those who ship all rail."

Neither does the fact that it is an established and recognized practice for railroads to maintain proportional rates for transportation between two points of freight having a prior or further movement which are different from the local rates which they charge for freight originating and terminating at the two points support the contention of appellants. Thus, the distinction recognized by this Court in *I.C.C.* v. *Inland Waterways Corp.*, 319 U. S. 671, cited by appellants, between proportional rates and rates for local movement and the holding that Section 2 is not nec-

essarily violated thereby because freight which is being hauled as a part of a through movement may be different and the terminal operations involved may be different from those in connection with freight transported locally, has no application where the difference in rates is between one proportional rate and another proportional rate for the same part of a through movement from the same origin to the same ultimate destination. In the present case there is no question of a difference between two rates where one is a local rate for transportation from mines to Hampton Roads of coal for local delivery and consumption there and the other is a proportional rate charged for the transportation from mines to Hampton Roads of coal destined to Hartford, Connecticut, or some other point of ultimate delivery in New England. On appellants' own use of the term the only issue here is as to the lawfulness of two different "proportional rates" for the same transportation service, part of the same through movement from the same origin to the same ultimate destination. The court below did not extend any prior interpretation of Section 2 in holding that such a difference could not be justified when predicated upon whether the further movement was by water or by rail, for this was what the Commission itself had long since held as to proportional rates in the *Chattanooga Packet* case just cited and this was the holding of this Court in the *Mechling* case.

Moreover, it is significant that this Court has held that the fact that a rate is a "proportional rate" does not exempt it from the various provisions of the Interstate Commerce Act such as Section 2. *A., T. & S. F. Ry.* v. *United States*, 279 U. S. 768, 776 (1928).

In the course of their argument based upon their theories concerning "proportional rates", respondents advance other contentions to support their claim that the lower

court went beyond the decision in the *Mechling* case. They are repetitions of arguments advanced below as to why the decision in the *Mechling* case that Section 3(1) and (4), as well as Section 2 of the Act were violated should not be followed here.

One of these contentions is the claim that the lower court erred in following the *Mechling* case because there the barge lines were "connecting lines" with the respondent railroads within the meaning of Section 3(4) of the Act, whereas here (as appellants contend) the Blue Line is not a connecting line of the defendant railroads since it does not receive coal directly from them at Hampton Roads but is engaged as the final carrier to point of ultimate delivery after the coal has reached New Haven by intermediate coastwise vessels. Such a contention is beside the point here, however, because the court below did not undertake to decide whether the rates and practices of the railroads, defendants before the Commission, constituted discrimination betwen the Blue Line and the New Haven Railroad within the prohibition of Section 3(4) of the Act. Its ruling that the charging of different rates for the same transportation violated Section 2, which prohibits the charging of different rates to shippers for like and contemporaneous service in the transportation of like traffic under substantially similar circumstances and conditions, was in no way dependent upon whether the Blue Line was a "connecting line" or whether there was also discrimination against it in violation of Section 3(4). It is to be observed however, that had the lower court also ruled upon the issue under Section 3(4) it would have constituted no extension of the law as interpreted in previous decisions to have held that the fact that in the accomplishment of through transportation of coal from mines to Hartford, Connecticut, or other point of ultimate delivery, both the Blue Line and the New Haven Railroad received the coal through the inter-

mediary of a coastwise water carrier rather than directly from the coal tipples at Hampton Roads does not prevent them from being regarded as connecting carriers within the meaning and prohibition of Section 3(4). Thus in *Atlantic Coast Line* v. *United States*, 284 U. S. 288, this Court said (p. 293):

> "There is no warrant for limiting the meaning of 'connecting lines' to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route."

See, also, *Chicago, I. & L. Ry.* v. *United States*, 270 U. S. 287, at page 293, and *St. Louis S. W. Ry.* v. *United States*, 245 U. S. 136, at page 144.

Another subsidiary argument made by appellant is that the lower court erred in following the decision in the *Mechling* case because here, as appellants contend, all of the Blue Line's transportation of coal between New Haven and points of ultimate delivery is beyond the jurisdiction of the Commission, whereas in the *Mechling* case some of the barge line transportation was subject to the Commission's jurisdiction. This again is a point which might be pertinent if the lower court had undertaken to consider whether or not there was discrimination between connecting carriers in violation of Section 3(4). It is a point, however, which has no relevance to the court's ruling that the rates and practices complained of were discriminatory in violation of Section 2. Under Section 2 of the Act, this Court held in the *Mechling* case as it had previously held in *Int. Com. Com.* v. *Delaware, L. & W. R. R.*, 220 U. S. 235 (1911) and in other cases, that a difference in charges for transportation between the same two points is not excused by "differences in circumstances arising either before the service of the carrier began or after it was terminated".

But even under Section 3(4) there really is no factual difference such as suggested by appellants between the present case and the *Mechling* case. The claim that the Blue Line's transportation of coal is beyond the jurisdiction of the Commission rests upon Section 303(b) of the Act providing that Part III thereof shall not "apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities". The subdivision also provides that two or more vessels while navigated as a unit, such as a tug and several barges, shall be considered to be a single vessel. The Blue Line moves coal in bulk and the evidence shows that generally it is moved in solid tows of barges containing coal alone. However, the record also shows that the Blue Line holds a certificate issued by the Commission as a common carrier by water subject to Part III, that it does and may at any time haul a barge of coal in a tow with three or more other commodities when the transportation would be subject to Part III, and that all of its rates for the movement of coal are published in tariffs filed with the Commission, so that it may engage in the transportation of coal subject to the regulatory jurisdiction of the Commission. What is more significant, however, in so far as concerns the controlling effect of the decision in the *Mechling* case, as Commissioner Mahaffie pointed out in his dissenting report, is that that case had to do with the transportation of grain which is likewise moved in barges in bulk, the movement being exempt from the application of Part III of the Act by the same provision which it is claimed exempts the Blue Line's transportation. This Court in its opinion in the *Mechling* case certainly did not hold that the railroads were free to discriminate between a connecting railroad and a connecting water carrier in their rates for the transportation of grain if the connect-

ing water carrier happened to handle the grain in bulk in a solid tow with no other commodities and that the railroads were only barred from such discrimination if the water carrier handled the grain in a manner making its rates subject to the Commission's regulatory authority. Therefore, there is no distinction on this ground between the present case and the *Mechling* case.[4]

Appellants argue further that there is a difference in the economic background between this case and the *Mechling* case which the District Court brushed aside. It is said that in the *Mechling* case there was a deliberate attempt to deprive the barge lines of participation in traffic which they had enjoyed and induce its transfer to the rails, and it is claimed that here the rate differences complained of do not hurt the Blue Line or shippers of coal over the Blue Line who are left in the same situation in which they would be if the Commission had not authorized general increases in the railroads' rates. Certainly, however, it is as clear an injury to the Blue Line or to would-be shippers of coal over the Blue Line or other water carrier as could be imagined for the defendant railroads to demand for transportation from mines to Hampton Roads 45 cents more a ton if the Blue Line or other water carrier is used for the movement of the coal to its final destination than they charge for the same transportation if the ultimate movement is by the New Haven Railroad. The Blue Line is in the position where shippers can use its services and the advantages of cheaper water transportation only by paying a penalty in higher rates for the earlier rail service. The

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[4] It is to be noted further that Section 3(4) provides that the right of a water carrier to invoke its provisions depends upon whether the water carrier is subject to the Act and not whether the particular transportation in which it engaged is exempted or not exempted from the provisions of Part III. As stated, the Blue Line is a water carrier subject to the Act and holds a certificate issued by the Commission to this effect.

shippers are similarly penalized. Moreover, it is not as though the shippers concerned could equally well forward their coal to ultimate destination by rail, because the record shows that the facilities of both the coal dealers and receivers are designed for water movement which under the practices and rates complained of they can have only by paying the penalty of higher freight rates for the initial rail haul from mines to Hampton Roads. There is certainly no extension of the decision in the *Mechling* case in the ruling of the lower court that it is controlling in these circumstances.

Lastly, it is said that Section 2 cannot be converted into a vehicle for striking down the proportional rates involved in this case without casting doubt on the validity of other proportional rates "which are tightly woven into the fabric of the nation's railroad rate structure." Appellants would have the national transportation policy declared by Congress to preserve the advantages of water transportation yield to the protection of the fabric of the railroad rate structure against changes which might result from the removal of prohibited discrimination. However, in answer to a similar contention in the *Mechling* case, this Court, as has been previously observed, held otherwise, saying (p. 580):

> "* * * The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress. See *United States* v. *Chicago, M. & St. P. R. Co.*, 294 U. S. 499, 506-510."

It is therefore submitted that the decision of the court below constituted no extension of the *Mechling* case and presented no new or substantial question as to the effect

and purposes of Section 2 such as to warrant argument on appeal.

POINT II

Apart from the Decision in the Mechling Case, the Decision of the Court Below Was in Accordance with Earlier Decisions of This Court Interpreting and Giving Effect to the Interstate Commerce Act.

Contrary to the argument of appellants that the lower court's decision constitutes an extension of the Interstate Commerce Act and a departure from established principles which warrant argument of the issues in this Court, the fact is, as we submit, that regardless of the *Mechling* case, the lower court's ruling was in conformity with and required by the basic purposes of the Act as long enunciated by this Court.

In *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361 (1906), the Court, sustaining a finding of the Commission that certain contracts and practices of the railroads were in violation of Sections 2 and 3 of the Interstate Commerce Act (pp. 404, 405), said at page 391:

> "It cannot be challenged that *the great purpose of the Act* to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, *was to secure equality of rates as to all* and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and *forbidding* rebates, *preferences and all other forms of undue discrimination.*" (Emphasis added.)

In *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, the Court said (p. 749):

> "The legislative history of the Interstate Commerce Act shows clearly that *the evil of discrimination was the principal thing aimed at.* Senate Report No. 46, 49,

Cong. 1st Sess., p. 215; See *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 597." (Emphasis added)

Then, too, there is the landmark decision in *Wight* v. *United States*, 167 U. S. 512 (1897), where this Court early interpreted and gave effect to Section 2 of the Act, holding that whatever might be the fact with regard to other provisions of the statute, external considerations did not excuse the charging of different rates for the same transportation service. The Court said as to Section 2 (p. 518):

> "* * * It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor."

Moreover, since the rate discrimination with which this case is concerned is between the use of water as against rail transportation, it is pertinent to recall the Congressional concern for the preservation of the benefits and economies of water transportation. This was evidenced in the enactment by the Congress of Section 500 of the Transportation Act, 1920 (United States Code, Title 49, Section 142), which provided in part:

> "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

It found later expression in the Declaration of the National Transportation Policy, which was written into the law as an introduction to the Transportation Act of 1940. In discussing the enactment of this Act, and referring to

the opponents to its passage who had feared that it would result in injury to water transportation for the benefit of railroads, this Court in the *Mechling* case noted (p. 575):

> "* * * These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service."

It is submitted that these considerations plainly dispose of the attempt of appellants to argue that the decision of the court below has the effect of depriving the Commission of authority to permit discrimination in rates under circumstances such as those here or to excuse higher rates for an identical rail service because a water carrier rather than a railroad is employed for the final movement of the freight involved. The decisions and the decision in the *Mechling* case leave no room for doubt justifying further consideration by this Court that the Commission has no such authority.

Point III

The Appellants' Contention That the District Court's Decision Is Contrary to the Decision in the Barringer Case Is Without Merit.

At page 8 of their statement, appellants assert that the refund arrangement which they presently maintain in respect to coal transported to the Hampton Roads ports is similar to a refund arrangement alleged to have been upheld in *Barringer* v. *United States*, 319 U.S. 1. They urge that "if the rate structure involved in *Barringer* is lawful, the decision of the District Court in this case is necessarily wrong". This statement reflects a misconception of issues before the Court in the *Barringer* case.

That case involved no difference in rates charged for the same transportation service over the same lines between the same points. As the Court's opinion made clear, it concerned the imposition of a loading charge on cotton shipped to the Southeast when no such charge was demanded of competing shippers on cotton shipped to Gulf ports. In language which clearly sustains the decision below in the case at bar and distinguishes the situation here from that there before it, the Court said (p. 9):

> "* * * We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers. *Wight v. United States*, supra; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, supra; *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, supra; *Seaboard Air Line Ry. Co. v. United States*, supra; *Louisville & Nashville R. Co. v. United States*, supra; *Merchants Warehouse Co. v. United States*, supra. The distinction between those cases and this is that here the difference in the service charge is made between through shippers over different routes, and is based on relevant differences in the 'circumstances and conditions' of the total transportation services rendered by the carriers. It was within the competence of the Commission to find that this involved no unjust discrimination."

Point IV

Appellants' Contention That None of the Appellees Was Entitled to Invoke Section 2 and That the District Court Erred in Finding to the Contrary is Also Without Substance.

Under Point 5 of the jurisdictional statement, appellants argue that none of the appellees was entitled to invoke the protection of Section 2 of the Interstate Commerce Act.

In support of this proposition, appellants assert that "Only shippers have standing to invoke Section 2." They then argue that appellees Jones & Co. and Wyatt are at liberty to use either rail or water in shipping coal beyond the New England ports and thus may avail themselves of the lower rates for transportation from mines to the Hampton Roads ports, if they chose, that consequently they are not subjected to injury and that, in the absence of injury, they may not invoke Section 2.

It should be observed, first, that in the *Mechling* case this Court, on the appeal of Mechling, a water carrier like the Blue Line and not a shipper, held that Section 2 of the Act was violated.

But even as to Jones and Wyatt, appellants' argument is without factual basis. Certainly, as the lower court said, Jones and Wyatt are injured if they are required to pay higher charges for the transportation of coal from mines to Hampton Roads when they thereafter forward that coal by water, for which their facilities are designed, and when they can obtain the benefit of the lower rates only by incurring the added handling expense of shipping the coal from their yards by rail. And how about the receivers whose plants are designed for the receipt of coal by water and, in the case of the Hartford Electric Light Co., could obtain the benefit of the lower rates only by altering its plant to handle more coal delivered by railroad?

But more than this, it is well settled that a decision that rates are discriminatory in violation of Section 2 is not dependent upon proof and a finding of injury to the shippers concerned. Thus in the *Mechling* case, the Court's decision that Section 2 was violated was not predicated upon a finding that the shippers of grain were in competition with one another or that they were subjected to injury. And the Commission itself has consistently held that proof of a competitive relationship between shippers and consequent

injury is not essential to establish a violation of Section 2. In *National Spring & Wire Co.* v. *Director General*, 60 I.C.C. 564 (1921), the Commission said (p. 566):

> "* * * But, while in a situation in which there is undue preference of one shipper and undue prejudice to another, in violation of section 3 of the act, competitive relations between the parties must generally appear, *Portsmouth Asso. of Commerce v. S.A.L. Ry. Co.*, 55 I.C.C. 377, not only is such a relationship between shippers not essential to a violation of section 2, but the existence of competition between carriers does not take an otherwise unlawful discrimination out of that section."

In *Douglas & Co.* v. *Illinois Central R.R. Co.*, 31 I.C.C. 587 (1914), the Commission stated at page 592:

> "But the defendants maintain that even under the terms of Section 2 it is necessary, in order to establish discrimination, that there be an advantage to one shipper and a corresponding disadvantage to another; and they rely on the statement of the complainant's witnesses that the removal of the milling-in-transit privilege enjoyed by the Quaker Oats Company would not inure to the benefit of Douglas & Company. To this contention we are not able to give approval."

In *United States* v. *Trucking Co.*, 310 U.S. 349 (1939), this Court upheld a decision of the Commission in *Chicago and Wisconsin Points Proportional Rates*, 17 M.C.C. 573. In its report in that case the Commission said at page 579:

> "* * * The existence of a competitive relationship between shippers is not essential to a finding of unjust discrimination. Forwarders are persons within the meaning of section 2 of part I, and for like reasons, under section 216(d) of part II of the act. See *Interstate Commerce Commission* v. *Delaware L. & W. R. Co.*, 220 U.S. 235."

And in *Mitchell* v. *United States*, 313 U.S. 80, the Commission had held discriminatory certain practices of the railroads which resulted in racial discrimination. It was urged on the Court that the Commission's order was invalid because there was no evidence that the rates which the Commission found discriminatory "would subject any particular person or type of traffic to disadvantage or injury." The Court refused to accept this argument. At page 97 it said:

> "On the facts here presented * * * it is enough that the discrimination shown was palpable, unjust and forbidden by the act."

In the light of the foregoing, the District Court was clearly correct in holding that the rates and practices of the appellants in relation to the transportation of coal to the Hampton Roads ports were in violation of Section 2. The appellants' contention to the contrary is therefore without substance.

Conclusion

For the foregoing reasons it is clear that this appeal presents no new or substantial questions. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

PARKER MCCOLLESTER,
25 Broadway,
New York 4, N. Y.
Counsel for Appellees
James McWilliams Blue Line, Inc.
T. A. D. Jones & Co., Inc.
The Hartford Electric Light Co.

ROBERT W. KNOX,
60 Broadway,
New York 4, N. Y.
Counsel for Appellees
Wyatt, Inc.
The United Illuminating Company.

LORD, DAY & LORD,
25 Broadway,
New York 4, N. Y.
KNOX, MATTHEWS & LASHMAN,
60 Broadway,
New York 4, N. Y.
Of Counsel.

Dated: January 23, 1952.

APPENDIX

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT

"Sec. 2. (U. S. Code, Title 49, sec. 2) That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, that it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"Sec. 3. (1) (U. S. Code, Title 49, sec. 3) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

"Sec. 3. (4) (U. S. Code, Title 49, sec. 3) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines,

or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 65-270

JAMES McWILLIAMS BLUE LINE, INC., T. A. D. JONES & CO., INC., Wyatt, Inc., The Hartford Electric Light Co., and The United Illuminating Company, Plaintiffs,

against

THE UNITED STATES OF AMERICA, ET AL., Defendants

STATEMENT FOR PLAINTIFFS-APPELLEES IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION

Plaintiffs-appellees in the above entitled cause, for their joint statement in opposition to the statement as to jurisdiction of defendants-appellants, deny that the appeal presents any new or substantial questions or any questions of public importance which cannot be disposed of on an examination of the appeal papers.

They submit that there is no material difference in the facts or issues between this case and *I. C. C.* v. *Mechling*, 330 U. S. 567, and that the determination of the questions here presented is controlled by the decisions of the United States Supreme Court in that case and in *Int. Com. Com. v. Delaware, L. & W. R. R.*, 220 U. S. 235; *Wight* v. *United States*, 167 U. S. 512, and other cases. They submit that the decision of the District Court holding that the rates and practices of which complaint was made to the Interstate Commerce Commission were discriminatory in violation of Section 2 of the Interstate Commerce Act was consistent with and required by the decisions in the cases cited and the language and purpose of the Act as there interpreted, and that the Commission's decision and order which the District Court set aside were not only erroneous in the light of these decisions but contrary to its own prior rulings in

the administration of the Act, such as that in *Chattanooga Packet Co.* v. *I.C. R.R. Co.*, 33 I.C.C. 384. And they submit that appellants' efforts by referring to the rates involved as proportional rates and as part of a complicated rate structure to create the impression that new problems are here presented and that the lower court's decision extends the ruling in the *Mechling* case and the application of Section 2, are without substance because the same character of rates, the same claim that a complicated rate structure would be disrupted by removal of the discrimination and the same basic considerations which are present here were present and dealt with by the decisions in the cases cited.

For a full statement of the contentions of plaintiffs-appellees in these regards, they respectfully refer to their motion to affirm the judgment of the District Court for the Southern District of New York, which motion is being filed contemporaneously herewith.

For the reasons outlined here and more fully stated in their motion to affirm, plaintiffs-appellees submit that no new and substantial questions are raised by the appeal which require or justify argument before the Supreme Court of the United States, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

LORD, DAY & LORD,
25 Broadway, New York 4, N. Y.
Attorneys for Plaintiffs-Appellees, James McWilliams Blue Line, Inc., T. A. D. Jones & Co., Inc., The Hartford Electric Light Co.

KNOX, MATTHEWS & LISHMAN,
60 Broadway, New York 4, N. Y.
Attorneys for Plaintiffs-Appellees, Wyatt, Inc., The United Illuminating Company.

PARKER MCCOLLESTER,
ROBERT W. KNOX,
FRANK J. CLARK,
Of Counsel.

Dated: January 23, 1952.